86-304

No.

Supreme Court, U.S.
FILED
AUG 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

DONALD P. HODEL, ET AL., PETITIONERS

v.

TRIBAL VILLAGE OF AKUTAN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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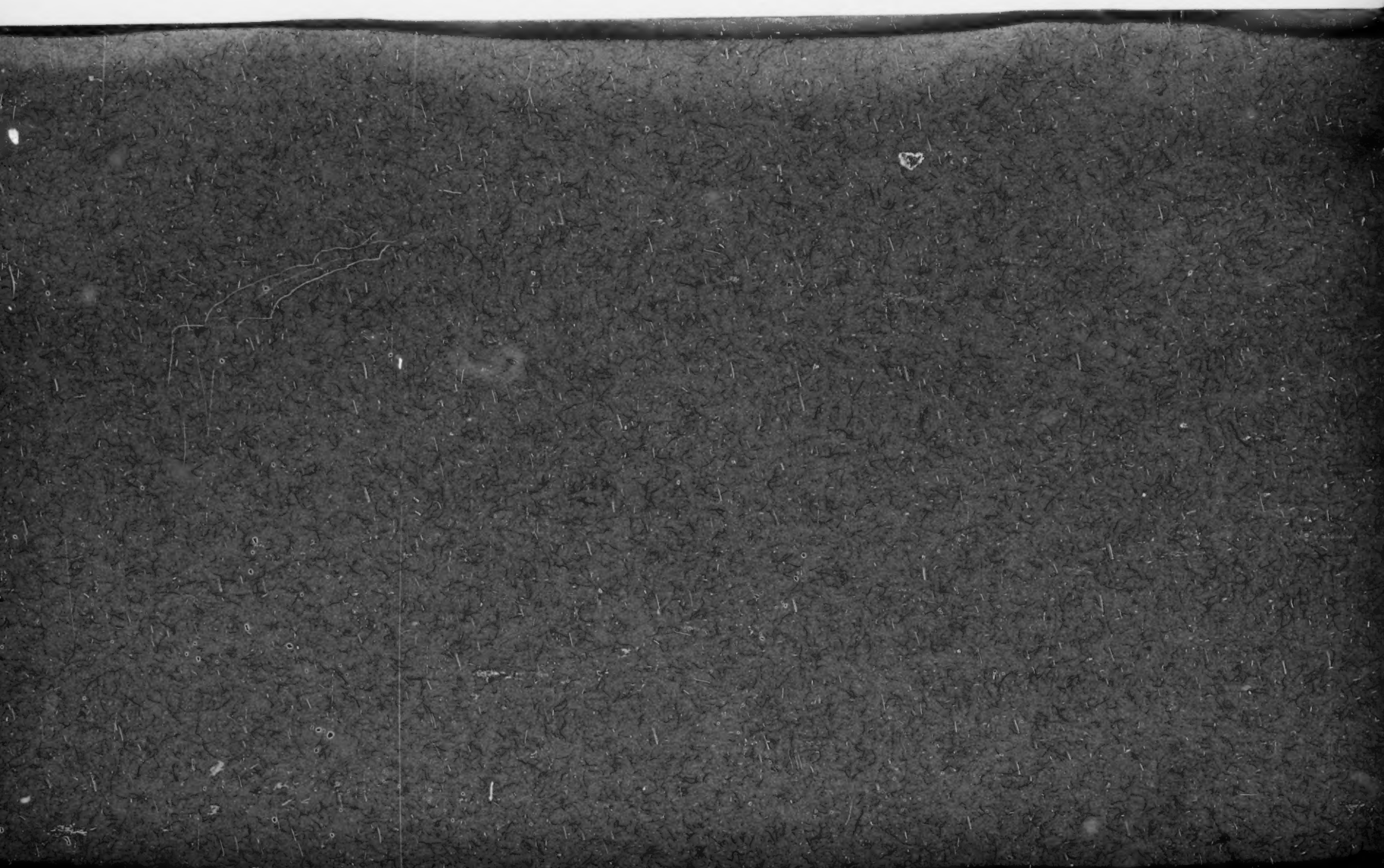

QUESTIONS PRESENTED

1. Whether a district court must, except in unusual circumstances, enter a preliminary injunction whenever it finds a likely violation of a procedural requirement of an environmental statute.

2. Whether Section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3120, which requires federal land managers to determine whether proposed dispositions of public lands in Alaska "would significantly restrict subsistence uses" and, if so, to follow certain procedures and make certain findings prior to any such disposition, applies to the outer continental shelf (OCS), when the Act defines "public lands" as lands which are "in Alaska" and "the title to which is in the United States."

3. Whether, even if Section 810 applies to the OCS, the Secretary may not proceed with OCS leasing until the Secretary of the Interior complies with Section 810's procedural requirements for all stages of the OCS program, including development and production.

4. Whether, even though the Secretary has found that significant restrictions on subsistence uses are unlikely, the Secretary still must follow the procedures mandated by Section 810 for disposition of public lands that "would significantly restrict subsistence uses" because of the possibility that such effects could nevertheless occur.

PARTIES TO THE PROCEEDING

The petitioners are Donald P. Hodel, Secretary of the Interior, subordinate officials of the Department of the Interior, Anthony Calio, Administrator of the National Oceanic and Atmospheric Administration (NOAA), and NOAA.

The respondents are:

Governor Bill Sheffield, State of Alaska
Alaska Independent Fishermen's Marketing Association
Aleutians East Coastal Resource Service Area
Bering Sea Fishermen's Association
Bristol Bay Borough
Bristol Bay Coastal Resource Service Area
Cenaliulriit
United Fishermen of Alaska
Tribal Village of Akutan
Tribal Village of Togiak
Tribal Village of Nelson Lagoon
Trustees for Alaska
Natural Resources Defense Council
Eskimo Walrus Commission
Northern Alaska Environmental Center
City of Quinhagak
Nunam Kitlutsisti
Alaska Center for the Environment
Village of False Pass
Sierra Club
Wilderness Society
Environmental Policy Institute
National Audubon Society
Defenders of Wildlife
Amoco Production Company
ARCO Alaska, Inc.

Chevron U.S.A., Inc.
Elf Aquitaine, Inc.
Exxon Corporation
Mobil Exploration & Producing Services, Inc.
Murphy Oil Company
Sohio Alaska Petroleum Company
Shell Western E & P, Inc.
Union Oil Company of California
International Association of Geophysical Contractors

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No.

DONALD P. HODEL, ET AL., PETITIONERS

v.

TRIBAL VILLAGE OF AKUTAN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Secretary of the Interior and the other federal parties, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-7a) is reported at 792 F.2d 1376.[1] The order of the district court as modified (App., *infra*, 9a-15a) is unreported.

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[1] The decision was originally issued as a memorandum opinion not for publication. On July 1, 1986, the panel issued an order redesignating the decision as a signed opinion (792 F.2d 1376). See App., *infra*, 8a.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 20a) was entered on April 28, 1986. By order dated July 17, 1986, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including August 26, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 810 of the Alaska National Interest Lands Conservation Act, 16 U.S.C. 3120, is set forth in the appendix to this petition (at 40a-41a).

STATEMENT

This case concerns the application of Section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3120, to the Secretary of the Interior's decision to hold Lease Sale 92 in the North Aleutian Basin area of the outer continental shelf (OCS) offshore Alaska. This case also concerns the appropriate judicial standard for determining whether injunctive relief is appropriate to redress a violation or a likely violation of Section 810. Both issues are currently pending before the Court in *Hodel* v. *Village of Gambell*, cert. granted, No. 85-1406 (June 2, 1986), and *Amoco Production Co.* v. *Village of Gambell*, cert. granted, No. 85-1239 (June 2, 1986).

1. In November 1974, the Secretary of the Interior first announced a lease sale in the Lease Sale 92 area (App. *infra*, 22a). The Secretary, however, postponed the lease sale to respond to concerns expressed by the State of Alaska. In March 1984, in response to those concerns, the Secretary reduced the

sale area by 83 percent (from 32.5 to 5.6 million acres) and adopted stringent mitigation measures to provide extra protection for fishery habitats, commercial fishing, and biological resources (1 Minerals Mgmt. Service, Alaska OCS Region, U.S. Dep't of Interior, *Final Environmental Impact Statement* (FEIS) I-A-3 (1985); see Secretary of the Interior, *Statement of Reasons for the Decision on Sale 92*, 71 (Dec. 1985)).

Although the Secretary was of the view that Section 810 of ANILCA does not apply to the OCS, he prepared a thorough pre-sale Section 810 evaluation of the impacts on "subsistence uses" [2] both of the lease sale and of possible future activities at the exploration and development and production stages; the Secretary incorporated the evaluation into the draft and final environmental impact statements prepared pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. (& Supp. II) 4321 *et seq.* (see FEIS, at IVK-1-IVK-10). In addition, the Secretary prepared a formal 72-page *Statement of Reasons for the Decision on Sale 92* (Statement of Reasons). The Statement of Reasons concluded, based on a careful evaluation of subsistence uses and consideration of the proposed oil and gas activities, that neither leasing, exploration, nor production resulting from Lease Sale 92 would significantly restrict subsistence uses (App., *infra*, 24a). Because the Secre-

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[2] The term "subsistence uses" is defined in Section 803 of ANILCA, 16 U.S.C. 3113, as "the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade."

tary recognized, however, that findings concerning possible future activities, particularly those regarding activities at the development and production stage, necessarily involve substantial speculation, the Secretary added that he would conduct new Section 810 analyses prior to his approval of any exploration plan, as well as prior to his approval of any development and production plan (App., *infra*, 26a).

2. In December 1985, respondents, including the State of Alaska, Trustees for Alaska, and the Tribal Village of Akutan, filed three lawsuits (later consolidated) in the United States District Court for the District of Alaska to enjoin the Secretary from conducting Lease Sale 92, which was scheduled to commence with the opening of sealed bids on January 15, 1986 (50 Fed. Reg. 51372 (1985)). Respondents alleged, inter alia, that the Secretary had violated Section 810 of ANILCA by construing Section 810 to require implementation of its notice, hearing and findings provisions (see 16 U.S.C. 3120(a)(1)-(3)) only when a proposed disposition of public lands "would" significantly restrict subsistence uses.[3] According to respondents, those additional procedural requirements are triggered where, as in this case, the proposed activity "may," but is unlikely to, restrict subsistence uses.

On January 13, 1986, the district court granted respondents' motion for a preliminary injunction and enjoined the Secretary from holding Lease Sale 92 (App., *infra*, 10a-15a). The court relied on the Ninth Circuit's decisions in *Kunaknana* v. *Clark*, 742 F.2d

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[3] Respondents also alleged that the Secretary's decision to conduct the lease sale violated Section 19 of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1345, NEPA, 42 U.S.C. (& Supp. II) 4321 *et seq.*, and Section 7 of the Endangered Species Act of 1973, 16 U.S.C. 1536.

1145 (1984), and *Village of Gambell* v. *Hodel*, 774 F.2d 1414 (1985), cert. granted, No. 85-1239 (June 2, 1986), in concluding both that the Secretary's second-tier procedural duties under Section 810 were triggered by a showing of a mere "possibility" or "threat" of a significant restriction of subsistence uses and that a preliminary injunction was required (App., *infra*, 11a-13a). The court ruled that Ninth Circuit precedent compels the issuance of a preliminary injunction where, as here, the moving parties had established a strong likelihood of success on their ANILCA claim (*id.*, at 13a). Later that day, the district court granted the Secretary's and the oil companies' applications for a partial stay of the injunction to allow the Secretary to receive all bids and to retain them unopened after the midnight deadline on January 15, 1986 (*id.*, at 16a-17a).

3. On April 28, 1986, the court of appeals affirmed. The court of appeals framed the legal issue presented as whether "the notice and hearing requirements under ANILCA section 810(a) apply * * * [only when] the Secretary find[s] that a proposed action '*would* significantly restrict subsistence uses' (16 U.S.C. § 3120(a) (emphasis added)) [o]r is a finding that significant restrictions 'may' result sufficient, even though such restrictions are deemed unlikely" (App., *infra*, 4a-5a). The court concluded that a determination that a significant restriction on subsistence is unlikely, but may occur, is sufficient to trigger Section 810's additional requirements. The court reasoned that dictum to that effect in its prior decision in *Hodel* v. *Village of Gambell*, *supra*, was "plainly controlling," notwithstanding that both the plain meaning of the statutory language and deference to agency construction supported an interpretation of Section

810 that limited its additional requirements to instances when the Secretary determined that such significant restrictions "would" occur (App., *infra*, 7a). The court acknowledged that in the absence of the *Gambell* dictum, these two competing considerations "might be compelling" (*ibid.*). Finally, the court of appeals affirmed the district court's issuance of a preliminary injunction on the ground that "[a]bsent unusual circumstances, irreparable damage is presumed and an injunction is required when an agency violates ANILCA Section 810(a)" (*id.* at 4a (citing *Village of Gambell* v. *Hodel*, 774 F.2d at 1422-1423)). See App., *infra*, 7a.

Pursuant to a joint motion of the parties, the district court on May 21, 1986, issued an order continuing its stay of the preliminary injunction and permitting the Secretary to continue to hold the unopened bids pending this Court's disposition of *Hodel* v. *Village of Gambell*, No. 85-1406, and *Amoco Production Co.* v. *Village of Gambell*, No. 85-1239.

REASONS FOR GRANTING THE PETITION

1. The Court has granted certiorari in *Hodel* v. *Village of Gambell*, No. 85-1406 (June 2, 1986), and *Amoco Production Co.* v. *Village of Gambell*, No. 85-1239 (June 2, 1986), to consider the application of Section 810 of ANILCA to an OCS lease sale, including: (1) whether Section 810 of ANILCA applies to the OCS; (2) whether OCS leasing may proceed before the Secretary complies with Section 810's procedural requirements for later stages of the OCS process; and (3) whether a finding that significant subsistence restrictions "may" occur, triggers the additional procedural requirements of Section 810. The

Court will also consider in those cases the standards for granting injunctive relief to redress violations or likely violations of Section 810. Because the same issues are presented here as well, the Court should hold the petition in this case and dispose of it as appropriate in light of its decision in *Village of Gambell.*

2.a. In addition to repeating the errors of *Village of Gambell,* the decision of the court of appeals in this case exacerbates these errors. In *Village of Gambell,* the Secretary had determined that significant subsistence restrictions would not occur at either the lease or exploration stage, but were likely to occur in certain areas at the development and production stage, should that stage be reached, which the Secretary concluded was unlikely. The court of appeals in that case held (erroneously, in our view) that the possibility of such later restrictions was sufficient to trigger Section 810's additional procedural requirements, although Section 810 expressly provides that those procedures must be followed only when a proposed disposition of public lands "would" significantly restrict subsistence uses. The court, in effect, ruled that the statutory term "would" means "may." Here, the court compounded its error by ruling that the "would" standard was met even where, as here, the Secretary had found that significant restrictions on subsistence resources were unlikely to occur at *any* stage, including development and production. Hence, the court has further diverged from the plain meaning of Section 810, which by utilizing "would" and not "may," requires some likelihood of significant subsistence restrictions. Cf. *Immigration & Naturalization Service* v. *Stevic,* 467 U.S. 407, 422 (1984)

(use of "would" in statute denotes standard of "likelihood").

b. Although we believe that the court of appeals erred in this additional respect, we do not seek review at this time on the issue. The basic issue of statutory construction is already before the Court in *Village of Gambell* and its decision in that case may well be controlling here.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's decision in *Hodel* v. *Village of Gambell*, No. 85-1406, and *Amoco Production Co.* v. *Village of Gambell*, No. 85-1239.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RALPH W. TARR
Solicitor
Department of the Interior

AUGUST 1986

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 86-3512/86-3514/86-3517

DC Nos. CV-A85-701-V
CV-J85-037-V
CV-J85-038-V

TRIBAL VILLAGE OF AKUTAN, ET AL.,
PLAINTIFFS-APPELLEES

v.

DONALD P. HODEL, ET AL.,
DEFENDANTS-APPELLANTS.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
James A. von der Heydt, District Judge, Presiding

Argued and Submitted Mar. 14, 1986
[Filed Apr. 28, 1986]

MEMORANDUM*

Before: DUNIWAY, GOODWIN, BRUNETTI, Circuit Judges

In this consolidated appeal, appellants Secretary of the Interior, ten oil companies, and others, seek review of a district court order granting a preliminary injunction restraining the Secretary from proceeding with Lease Sale 92 in the North Aleutian Basin. We affirm.

I. BACKGROUND

Lease Sale 92 is proposed as part of the Department of Interior's current five-year offshore oil and gas leasing program, established under section 18 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1344. In preparing for the Sale, the Secretary was required to conduct an evaluation of the effects of the sale on subsistence uses and resources pursuant to section 810(a) of the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. § 3120(a). Section 810(a) can be described as consisting of two tiers, the first requiring an evaluation, and the second, under the appropriate circumstances, requiring notice, hearings, and minimization of adverse impact upon subsistence uses and resources.

The Secretary conducted an evaluation pursuant to the first tier of section 810(a), but based on his finding that significant subsistence restrictions were "unlikely," declined to undertake the second tier procedures of noticed hearings and mitigation of environmental harm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

Following the Secretary's announcement in December 1985, of his decision to go forward with Lease Sale 92, appellees the State of Alaska, Trustees for Alaska, the Tribal Village of Akutan, and others, filed suit in federal district court. The parties sought a preliminary injunction against the receipt and opening of bids based on violations of ANILCA and other statutes.[1]

On January 13, 1986, the district court enjoined the Secretary from proceeding with the bidding process in Lease Sale 92. Invoking two recent Ninth Circuit decisions construing ANILCA, the court concluded that the Secretary had applied an incorrect legal standard in determining his duties under section 810(a) and accordingly had failed to comply with the notice and hearing requirements in section 810(a)(1)-(3). Specifically, the court held that, notwithstanding the Secretary's finding that subsistence restrictions were unlikely, where a proposed action "may significantly restrict subsistence uses," the Secretary is required to proceed with notice and hearing under the second tier of section 810(a). Memorandum and Order at 2-3, *citing People of the Village of Gambell v. Hodel (Gambell II)*, 774 F.2d 1414, 1421-22 (9th Cir. 1985), and *Kunaknana v. Clark*, 742 F.2d 1145, 1151 (9th Cir. 1984). The district court concluded that appellants had established a strong likelihood of success on their ANILCA claim, and that an injunction was required as a matter of course under *Gambell II*, 774 F.2d at 1422-26.

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[1] Appellants alleged violations of section 19 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1345, section 102(c) of the National Environmental Policy Act, 42 U.S.C. § 4332(c), and sections 7 and 9 of the Endangered Species Act, 16 U.S.C. §§ 1536, 1538.

Having granted a preliminary injunction based on appellants' ANILCA claim, the court declined to address the other alleged statutory violations.

II. STANDARD OF REVIEW

Our review of a ruling on a motion for a preliminary injunction is "very limited." *Apple Computer, Inc. v. Formula International, Inc.*, 725 F.2d 521, 523 (9th Cir. 1984). "The grant or denial of a motion for a preliminary injunction lies within the discretion of the district court," *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982), and will be reversed only for an abuse of discretion or if the decision is based on an erroneous legal standard. *Oakland Tribune, Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985).

"To obtain a preliminary injunction, a party must show either 1) a likelihood of success on the merits and the possibility of irreparable injury, or 2) the existence of serious questions going to the merits and the balance of hardships tipping in its favor." *Apple Computer*, 725 F.2d at 523. Absent unusual circumstances, irreparable damage is presumed and an injunction is required when an agency violates ANILCA section 810(a). *Gambell II*, 774 F.2d at 1422-23.

Because the preliminary injunction rested solely on the district court's interpretation of section 810(a), our review is, as a practical matter, *de novo*.

III. DISCUSSION

The central issue before us can be simply framed: When do the notice and hearing requirements under ANILCA section 810(a) apply? Must the Secretary

find that a proposed action "*would* significantly restrict subsistence uses?" 16 U.S.C. § 3120(a) (emphasis added). Or is a finding that significant restrictions "*may*" result sufficient, even though such restrictions are deemed unlikely?

The Secretary contends that a finding that a proposed action "would" significantly restrict subsistence uses is required to trigger section 810(a)(1)-(3) notice and hearing procedures. He offers the following arguments in support of his construction: 1) this court's decision in *Kunaknana* and *Gambell II* do not require compliance with section 810(a)(1)-(3) absent a likelihood of significant restrictions upon subsistence resources, and 2) the Secretary's construction is required by the plain language of the statute and is entitled to judicial deference. We consider these arguments in turn.

A. *Kunaknana* and *Gambell II*.

In *Kunaknana v. Clark*, 742 F.2d 1145 (9th Cir. 1984), we read section 810(a) as requiring notice and public hearings "if the agency first concludes that the contemplated action *may* significantly restrict subsistence uses." *Id.* at 1151 (emphasis added).

> The inference to be drawn from [the phrase "which would significantly restrict subsistence uses"] is that Congress intended a two-step process: first, the agency determines whether the contemplated action may significantly restrict subsistence use; if it may, the agency must comply with the notice and hearing procedures. This construction of the statute is a reasonable one, relying on the plain meaning of the words of the statute.

Id.

Although the *Kunaknana* court was not called upon specifically to decide when section 810(a)(1)-(3) procedures would be required, its analysis has subsequently formed the basis for a holding in this circuit.

In *People of the Village of Gambell v. Hodel (Gambell II)*, 774 F.2d 1414 (9th Cir. 1985), the Secretary's section 810(a) evaluation indicated that development and production of the proposed lease sale "may significantly restrict subsistence uses in certain areas." *Id.* at 1422. The court held that under *Kunaknana* the Secretary's finding required that he proceed with the notice and hearing procedures under section 810(a)(1)-(3). *Id.*

Moreover, the argument that the Secretary makes here was presented in nearly identical form to the *Gambell II* court:

> Interior has interpreted the language of Section 810 to require a likelihood of a significant restriction to be evident before the procedures of Subsections 810(a)(1)-(3) come into play. Thus, it found here that "given the low probability that oil will be found, these possible restrictions [at the production stage] are not likely to occur, even locally, as a result of the sale" . . . . It also found that significant restrictions on subsistence at the exploration stage "are not likely * * *" . . . .

Supp. ER, Vol. II, Ex. 10, CR 32.

The *Gambell II* court rejected the Secretary's view that section 810(a)(1)-(3) procedures required a *likelihood* of significant subsistence restrictions, and, on findings not meaningfully different than those here, concluded that the Secretary was required to

comply with the notice and hearing requirements of the statute. We believe that *Gambell II* governs this case, and that the district court did not err in determining that appellants had shown a strong likelihood of success on the merits of their claim that the Secretary had failed to comply with the notice and hearing requirements of section 810(a)(1)-(3).

B. *Plain Language and Deference to Agency Interpretation*

The Secretary next urges that his interpretation of section 810(a)(1)-(3) is required by the plain language of the provision, and, as an agency's interpretation of a statute it is charged with administering, is entitled to a high degree of judicial deference and must be upheld unless unreasonable. Both these arguments might be compelling in the abstract, but because we consider *Gambell II* plainly controlling, they do not alter our conclusion that compliance with section 810(a)(1)-(3) procedures is required before the Secretary may proceed with Lease Sale 92. *See Cubanski, etc. v. Heckler*, No. 85-7123, slip op. at 7, (9th Cir. March 6, 1986) (courts are the final authorities on issues of statutory construction).

CONCLUSION

The district court applied the correct legal standard in concluding that the Secretary must comply with the notice and hearing procedures in ANILCA section 810(a)(1)-(3) when he finds that significant restrictions on subsistence uses are "unlikely." Having identified a probable ANILCA violation, the court did not abuse its discretion in granting a preliminary injunction. AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 86-3512/86-3514/86-3517

DC Nos. CV-A85-701-V
CV-J85-037-V
CV-J85-038-V

TRIBAL VILLAGE OF AKUTAN, ET AL.,
PLAINTIFFS-APPELLEES

v.

DONALD P. HODEL, ET AL.,
DEFENDANTS-APPELLANTS

[Filed July 1, 1986]

ORDER*

Before: DUNIWAY, GOODWIN, BRUNETTI, Circuit Judges

The memorandum disposition in this case, filed April 28, 1986, is redesignated as an opinion authored by Judge Brunetti as per the attached.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

No. A85-701

TRIBAL VILLAGE OF AKUTAN, ET AL.,
PLAINTIFFS

v.

DONALD P. HODEL, ET AL.,
DEFENDANTS

AMOCO PRODUCTION COMPANY, ET AL.,
INTERVENOR-DEFENDANTS

No. J85-037CIV

GOVERNOR BILL SHEFFIELD, ET AL.,
PLAINTIFFS

v.

DONALD P. HODEL, ET AL.,
DEFENDANTS

AMOCO PRODUCTION COMPANY, ET AL.,
INTERVENOR-DEFENDANTS

No. J85-038 CIV

TRUSTEES FOR ALASKA, ET AL.,
PLAINTIFFS

v.

DONALD P. HODEL, ET AL.,
DEFENDANTS

AMOCO PRODUCTION COMPANY, ET AL.,
INTERVENOR-DEFENDANTS

[Filed January 13, 1986]

MEMORANDUM AND ORDER

THIS CAUSE comes before the court on the plaintiffs' motions for preliminary injunction. Oral argument has been waived by all parties.

An injunction must issue in this case because the Secretary applied the incorrect standard in determining whether the lease sale would significantly effect subsistence uses under ANILCA § 810. Given that the Secretary cannot open lease bids based on a probable violation of ANILCA, the court finds it unnecessary to address the remaining claims at this time.

ANILCA requires the Secretary, prior to holding any lease sale, to determine whether the lease "would significantly restrict subsistence uses." ANILCA § 810, 16 U.S.C. § 3120 (1982). If the Secretary

finds significant restriction, then the notices and hearings stated § 810(a)(1)(-3) are required.

The Secretary found that Lease Sale 92 would cause no significant restriction on subsistence for the reason that the lease sale and connected exploration, development, and production activities were "*unlikely* to significantly restrict subsistence uses" in any area. FEIS IV-K-9 (emphasis added). In so finding, he applied the incorrect legal standard.

The Ninth Circuit has held in both *Kunaknana v. Clark*, 742 F.2d 1145, 1151 (9th Cir. 1984), and in *People of the Village of Gambell v. Hodel*, 774 F.2d 1414, 1421-22 (9th Cir. 1985) (*Gambell II*), that ANILCA requires notice and hearing if the proposed action "may significantly restrict subsistence uses." [1] According to the Ninth Circuit in *Gambell II*, this standard requires a finding of significance if there is a "possibility" of significant restriction, 774 F.2d at 1416, or a "threat" thereof. *Id.* at 1422. The Ninth Circuit's standard thus represents a lower threshold (i.e., requires less certainty of environmental harm) than the likelihood standard adopted by the Secretary.[2]

Plaintiffs also allege that the Secretary violated ANILCA in finding that no restriction on subsistence would occur if substitute subsistence species were

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[1] In adopting this standard, the Ninth Circuit no doubt intended courts to draw on NEPA case law as a guideline for determining significance. *See Foundation for North American Wild Sheep v. United States Dept. of Agriculture*, 681 F.2d 1172 (9th Cir. 1982).

[2] Additionally, the court notes that the appropriateness of this "likelihood" standard was specifically argued to the Ninth Circuit in *Gambell II* and impliedly rejected by that court. *See* Pl. ex. 10 & 11, Tribal Village reply brief.

available, and in evaluating subsistence effects on a regional basis, rather than on a village-by-village basis. Given that the FEIS does not adequately discuss how potential effects on different species could affect the availability of subsistence resources, it is unclear on what basis the Secretary determined (beyond his oil spill risk analysis) that subsistence effects were unlikely. In any event, a new subsistence determination must be made and such a determination could well moot these issues. For similar reasons, the court also finds it unnecessary to address other ANILCA issues at this time.

Defendants have indicated to the court that they wish to attempt to dispose of the issues in this action by way of summary judgment motions. The court invites such motions for the reason they potentially would permit it to address and dispose all issues only once.[3] In the event the parties wish to file additional motions, they should do so by March 12, 1986. For those issues that have already been briefed, the court finds additional rebriefing to be unnecessary. Similarly, if it becomes necessary to address plaintiffs' remaining claims on a preliminary injunction basis, plaintiffs may file renewed motions for preliminary injunction incorporating their current briefing.

Fed. R. Civ. P. 65(c) requires this court to address proper security upon the issuance of an injunction. The court finds the tribal village and environmental plaintiffs are unlikely to be in a position to post meaningful security for damages in this action, given the extent of potential economic harm. The State of Alaska shall post a bond of $10,000 as security for

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[3] Absent such motions, each issue must be addressed twice, once on preliminary injunction and once on the merits. Multiple appeals could result.

costs in this action. No security is required for damages, it being unlikely that damages will accrue or be awarded.

In conclusion, the court finds that plaintiffs have established a strong likelihood of success on their ANILCA claim. Accordingly, the court is without discretion and an injunction must issue, no unusual circumstances being present. *Gambell II*, 774 F.2d at 1422-1426.

Therefore, IT IS ORDERED:

(1) THAT plaintiffs' motions for preliminary injunction are granted;

(2) THAT the State of Alaska post $10,000 security for costs with the court no later than January 24, 1986; and

(3) THAT such additional motions as the parties may find appropriate shall be filed no later than March 12, 1986.

DATED at Anchorage, Alaska, this 13th day of January, 1986.

/s/ James A. Von der Heydt
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

No. A85-701

TRIBAL VILLAGE OF AKUTAN, ET AL.,
PLAINTIFFS

v.

DONALD P. HODEL, ET AL.,
DEFENDANTS

AMOCO PRODUCTION COMPANY, ET AL.,
INTERVENOR-DEFENDANTS

No. J85-037CIV

GOVERNOR BILL SHEFFIELD, ET AL.,
PLAINTIFFS

v.

DONALD P. HODEL, ET AL.,
DEFENDANTS

AMOCO PRODUCTION COMPANY, ET AL.,
INTERVENOR-DEFENDANTS

No. J85-038 CIV

TRUSTEES FOR ALASKA, ET AL.,
PLAINTIFFS

v.

DONALD P. HODEL, ET AL.,
DEFENDANTS

AMOCO PRODUCTION COMPANY, ET AL.,
INTERVENOR-DEFENDANTS

[Filed Jan. 13, 1986]

PRELIMINARY INJUNCTION

For the reasons set forth in the court's memorandum and order of this date, IT IS ORDERED:

(1) THAT Secretary of the Interior Donald P. Hodel, Director of the Minerals Management Service William D. Bettenberg, and their agents, servants, employees and attorneys are enjoined from receiving, opening, or accepting bids on, or otherwise conducting Lease Sale 92;

(2) THAT this injunction shall be effective immediately and shall remain in force until further order of the court;

(3) THAT no later than January 24, 1986, the State of Alaska shall post $10,000 security for costs with the court.

DATED at Anchorage, Alaska, this 13th day of January, 1986.

/s/ James A. Von der Heydt
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A85-701 Civil
(Consolidated)

TRIBAL VILLAGE OF AKUTAN, ET AL.,
PLAINTIFFS

v.

DONALD P. HODEL, ET AL.,
DEFENDANTS

AMOCO PRODUCTION COMPANY, ET AL.,
INTERVENOR

[Filed Jan. 13, 1986]

ORDER GRANTING PARTIAL STAY OF
PRELIMINARY INJUNCTION

This court's order of January 13 granting the motions for preliminary injunction of Sale 92 is partially stayed pending resolution of the appeal by the oil company intervenor-defendants Amoco Production Company, *et al.*, to the Ninth Circuit, as follows:

1. The Secretary may receive sealed bids for OCS Lease Sale 92 tracts as previously scheduled for January 15, 1986, but the Secretary is enjoined from opening any OCS Lease Sale No. 92 bids until further order of this court or of a court exercising appellate jurisdiction.

2. The effectiveness of 30 C.F.R. § 256.47(a) and the notice published at 50 Fed. Reg. 51,372 (December 16, 1985) to the extent they require bid opening by 11:59 p.m. January 15 are tolled until further order of this court or of a court exercising appellate jurisdiction. *See California v. Clark* (No. 83-6436, 9th Cir., Order of November 30, 1983). The Secretary of the Interior shall retain all Sale No. 92 bids unopened and under seal until that time.

3. The provision of paragraph 2 of the notice published at 50 Fed. Reg. 51,372, permitting bids to be withdrawn up to 30 minutes prior to scheduled bid opening is tolled to the same extent as the provision of the notice referred to in paragraph 2 above.

Jan. 13, 1986

/s/ James A. Von der Heydt
JAMES A. VON DER HEYDT
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A85-701 Civil
(Consolidated)

TRIBAL VILLAGE OF AKUTAN, ET AL.,
PLAINTIFFS

v.

DONALD P. HODEL, ET AL.,
DEFENDANTS

AMOCO PRODUCTION COMPANY, ET AL.,
INTERVENOR

[Filed May 2, 1986]

ORDER

Good cause showing, effective upon issuance of the mandate of the Ninth Circuit in this action, the following is ORDERED:

1. This Court's order of January 13, 1986 staying in part its preliminary injunction order of the same date shall remain in effect pending further order of this Court or of a court exercising appellate jurisdiction in this case. This Court will not dissolve the January 13, 1986

partial stay until the Supreme Court denies *in toto* defendants' petitions for certiorari or issues a decision on the merits of all questions as to which certiorari has been granted in *Amoco Production Co. v. Village of Gambell*, No. 85-1239, *Hodel v. Village of Gambell*, No. 85-1406, and *Village of Gambell v. Hodel*, No. 85-1608.

2. Paragraph 1 of this Court's March 3, 1986 order is modified to stay discovery in this case until: The Supreme Court denies *in toto* defendants' petitions for certiorari or issues a decision on the merits of all questions as to which certiorari has been granted in *Amoco Production Co. v. Village of Gambell*, No. 85-1239, *Hodel v. Village of Gambell*, No. 85-1406, and *Village of Gambell v. Hodel*, No. 85-1608.

3. Paragraph 2 of this Court's March 3, 1986 order is modified to provide that any time remaining for response by the federal defendants to plaintiffs' discovery will commence to run again at the time the stay of discovery is vacated pursuant to paragraph 2 above.

/s/ James A. Von der Heydt
JAMES A. VON DER HEYDT
United States District Judge

Dated May 21, 1986

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 86-3512/86-3514/86-3517

TRIBAL VILLAGE OF AKUTAN, ET AL.,
PLAINTIFFS-APPELLEES

v.

DONALD P. HODEL, ET AL.,
DEFENDANTS-APPELLANTS

[Filed Apr. 28, 1986]

[JUDGMENT]

APPEAL from the United States District Court for the ..... District of .....

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Anchorage District of Alaska and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

APPENDIX H

DEPARTMENT OF THE INTERIOR

SECRETARY OF THE INTERIOR'S STATEMENT OF THE REASONS FOR THE DECISION ON SALE 92

DECEMBER 1985

SECTION 19 OF OCS LANDS ACT

I. Introduction

Section 19(c) of the Outer Continental Shelf (OCS) Lands Act, 43 U.S.C. 1345(c), requires the Secretary of the Interior to review the Governor's recommendations on the size, timing, or location of a proposed lease sale to determine if "they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State." The determination of the national interest is "based on the desirability of obtaining oil and gas supplies in a balanced manner and on the findings, purposes, and policies of this Act." The first component of the national interest is addressed in Part II.B, below. The findings and purposes of the Act, set forth in 43 U.S.C. 1801-02, and the policies set forth in 43 U.S.C. 1332, are discussed in Part II.C, below. The statute does not define what is meant by the second component of section 19, the "well-being of the citizens"

of a State. That standard, based principally on the Governor's recommendation letter, is discussed in Part III, below.

If the Governor's recommendations on size, timing, or location provide a reasonable balance between these national and state interests, the Secretary is required to accept them. If not, the Secretary may reject the recommendations or adopt alternative measures identified through consultation with the Governor. Section 19 requires communication of a written explanation to the Governor of the Secretary's reasons for accepting or rejecting a Governor's recommendations.

The consultation process for Sale 92 has been extensive. Officials of the State and the Department met frequently and exchanged correspondence and information in great detail over the past three years and indeed over the past 11 years since the November 14, 1974, announcement that a sale was scheduled in this area. Following the proposed Notice of Sale in September 1985, the Governor requested and received additional information from the Department to assist in preparing his section 19 recommendations. He transmitted his formal recommendations to the Secretary and met personally to discuss his position on November 5, 1985. Department officials met with the Governor's representative in Washington, D.C. on November 27, 1985, to provide updated information concerning expected costs and benefits of proceeding with the proposed sale. The Department provided the Governor with an opportunity to review this information and reconsider his earlier recommendation that Sale 92 be delayed until 1994. The Secretary and Governor consulted again by telephone to discuss the

Governor's recommendation on December 4, 1985. The Governor reiterated his position that the sale must be delayed until 1994, notwithstanding the revised information on costs and benefits of proceeding with the sale as proposed in January 1986. The section 19 letter and this Statement of Reasons complete the section 19 process by explaining both the Secretary's decision on the Final Notice of Sale and his decisions on the Governor's recommendations as to size, timing, or location.

* * * * *

SECTION 810 OF ANILCA

Section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3120, creates special steps a federal agency must take before it decides to "withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public land." Specifically, the agency must first evaluate three factors: the effect of its action on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and alternatives which would "reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes." If the agency concludes that its action "would significantly restrict subsistence uses," it must notify the appropriate State agency, regional council, and local committee. It then must hold a hearing in the vicinity of the area involved, and must make three findings:

> that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will in-

volve the minimal amount of public lands necessary to accomplish the purpose of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions. 16 U.S.C. 3120(a)(3).

In *People of the Village of Gambell v. Clark*, 746 F.2d 572 (9th Cir. 1984) (*Gambell I*), the court ruled that the "lands and waters" of the OCS were "public lands" for the purpose of this section. The court later ruled that the provisions of section 810 should not be applied in a staged manner, despite the staged decisionmaking approach set out in the OCS Lands Act and relied upon by the Supreme Court in *Secretary of the Interior v. California*, 464 U.S. 312, 325-342 (1984). *People of the Village of Gambell v. Hodel*, Civ. No. 85-3877 (9th Cir. Oct. 25, 1985).

I. MMS's 810 Evaluation

Although the Department believes the court of appeals has misinterpreted the law, it prepared the evaluation required by section 810, finding that activities on leases issued at Sale 92 would not significantly restrict subsistence uses at the lease sale, exploration, or development and production stages. This finding was true not only of the sale area itself (where virtually no subsistence hunting or fishing is carried out), but also of areas beyond the sale area which might be affected by lessees' activities. These areas included Unalaska, Cold Bay, and the Bristol Bay region, with special attention given the lower Alaska Peninsula subregion.

Uses of subsistence resources are discussed elsewhere in the EIS (pp. III-C-4 and IV-B-1-(4)) and

are incorporated by reference in the section 810 analysis. Subsistence resources noted in the EIS include salmon, moose, caribou, waterfowl, crab, other saltwater fish, fresh-water fish, seal, walrus, reindeer, and beaver.

The evaluation considered various possible sources of effects on subsistence uses including seismic surveys, aircraft and vessel traffic, increase in sport harvests by non-rural, nonresident OCS workers, and oil spills. To determine if a significant restriction of subsistence uses and needs is likely to result from the proposal, the EIS considered the likelihood of: (a) a reduction of the population of harvestable resources; (b) a reduction of the availability of resources by altering their normal distribution patterns; and (c) a limitation of access to subsistence resources.

Several assumptions were made to facilitate the evaluation of the development and production stage. First, the analysts assumed that oil and gas will be found in economically recoverable amounts. Second, they assumed that pipelines will transport oil and gas from the offshore leases to oil and LNG terminals located at Balboa Bay. Third, they assumed that one or more spills of 1,000 barrels or more will occur during the productive life of the field. Finally, they assumed that additional measures found in the Final Notice of Sale to mitigate possible restrictions on subsistence uses were not in place.

The 810 evaluation summarizes effects of the proposed lease sale on subsistence uses and needs, the availability of other lands for Federal OCS leasing in the North Aleutian Basin planning area, and other alternatives that would reduce or eliminate the use of the lease sale area needed for subsistence purposes.

The analysis found that the effects of the proposal would not significantly restrict subsistence uses at any of the three stages of the OCS process. The EIS stated that, although these findings are based upon reasonable and valid assumptions, there necessarily is a great deal of uncertainty before a lease sale about the precise location, timing, or level of intensity of either exploration or development and production. Therefore, if leases are issued and exploration plans are submitted to MMS for review and approval, possible effects on subsistence uses will again be analyzed pursuant to section 810 of ANILCA before exploration plans are approved. If discoveries are made and development and production plans are submitted to MMS, they too would be subject to review under section 810 prior to approval.

In September 1985, the Minerals Management Service released an environmental assessment re-evaluating the analysis of environmental effects using lower oil and gas resource estimates for Alternatives I and IV. A reevaluation of the section 810 analysis concluded that leasing, exploration, and development and production activities would not restrict subsistence uses significantly.

II. The Governor's Comments and MMS's Response

The State asserts that MMS has prepared an inadequate analysis of the effects of the sale on subsistence uses, in violation of section 810. The State claims that the analysis "fails to consider subsistence uses outside the sale area" and fails to consider "significant impacts to some subsistence resources, which [impacts] are predicted in the final EIS. . . ." [33] On the

[33] Although the State submitted extensive comments on the draft EIS (see EIS at V-7 through V-59), it did not comment

contrary, MMS's 810 analysis satisfies what is required under the law.

The proposed sale area includes 990 blocks covering approximately 5.6 million acres. The 810 evaluation analyzed the effects of activities in and associated with the sale area on subsistence uses in "Unalaska, Cold Bay, the Bristol Bay region (including the northern shore of Bristol Bay), and the lower Alaska Peninsula subregion." (EIS p. IV-K-3). This area covers more than 65 million acres, 12 times larger than the sale area itself, and is one-sixth the size of the State of Alaska. So the evaluation plainly extends beyond the sale area.

The State's principal criticisms are that the evaluation improperly fails to consider the effects of production activities on subsistence uses in two areas far from the sale, the Pribilof Islands and the Yukon-Kuskokwim deltas.[34] Each of the criticisms is, however, incorrect. Sale 92 activities will not signifi-

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on or criticize the 810 evaluation in that draft (Draft EIS p. IV-K-1).

The State also questions "whether an adequate 810 evaluation can be performed until the fourteen outstanding information needs identified by the State for Sale 92 have been filled." These alleged needs are addressed elsewhere in this Statement of Reasons. The 14 studies are not needed to analyze the issues set forth in section 810.

[34] The nearest point of the lease sale area is approximately 170 miles from St. George Island, the nearest of the Pribilof Islands group, and approximately 235 miles from Kwigillingok, the location of which approximates the entry to Kuskokwim Bay. The delta of the Yukon River is approximately 450 to 500 miles from the nearest point of the lease sale area.

cantly restrict subsistence uses in the Pribilof Islands or in the Yukon-Kuskokwim deltas.

A. Effects on Subsistence Use of Fur Seals

According to the State:

> [T]here is no discussion of the effect that a one time loss of a few thousand to possibly several thousand northern fur seals could have on fur seal subsistence harvests in the Pribilofs. An even greater segment of the northern fur seal population could be affected by a tanker spill in Unimak Pass during the spring or fall migration, but the final EIS does not even address the effects of a Bering Sea tanker spill. (Enclosure V, p. 1).

The EIS found the effects of potential oil spills on these seals to be negligible.

> Oil-spill risks to northern fur seals and their primary habitats on and near the Pribilof Islands and Unimak Pass and the shelf-break area in the southern Bering Sea are less than 10 percent for spill contacts within 30 days (Fig. IV-10). Given that even a large 100,000-barrel spill would be highly weathered and dispersed within this period of time (mostly tar balls and thick, highly weathered patches), oil-spill contact with even a small number of fur seals is very remote. (EIS p. IV-B-77).

The Bering Sea is home to approximately 871,000 northern fur seals. (EIS at III-B-33). Of these, Pribilof Islanders ordinarily use the equivalent of only 2,000 to 2,500 seals per year for subsistence. (Sale 89 EIS p. III-63). (In 1985, when only a sub-

sistence harvest was allowed, the Islanders took 3,400 fur seals.) The death of even a few thousand from an oil spill would have a negligible effect on the subsistence harvest. Until this year, the Islanders were killing 25,000 seals each year in a commercial harvest (Sale 89 EIS p. III-63), without harming the number available for subsistence. MMS's decision not to treat a potential loss of a few thousand seals as a significant restriction was reasonable.

Additionally, the EIS for Sale 92 did consider the effect of a tanker spill in the Unimak Pass on the northern fur seal. On page V-280, the EIS incorporates by reference the twelve-page catastrophic oil spill analysis included in the EIS for Sale 89, St. George Basin. That analysis assumed that a tanker carrying 800,000 barrels of crude oil ran aground in Unimak Pass, spilling all its cargo in three days. The spill was assumed to occur in May or early June, the period when "an oil spill would pose the greatest risk to the majority of the biological resources using the Unimak Pass." (Sale 89 EIS p. IV-193).

The analysis shows how improbable it is that such a spill would significantly restrict subsistence uses of the northern fur seal. First, there is less than 0.5% chance that a spill in the Pass would reach the seal rookeries on the Pribilofs. (EIS Tables G-7, G-8, and G-9).[35] Second, because the seals swim through the

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[35] The concentration of the spilled oil in the water would have been diluted to "background level," one part of oil per billion of water, by the time the spill had traveled 240 kilometers from the Pass. (Sale 89 EIS p. IV-196). The Pribilofs are more than 360 kilometers from the Pass. So there is no basis for concern about the effects of the spill on water quality near the rookeries.

Pass on their way to forage south of the Alaska Peninsula, the analysis also considered the effects of the spill on those traveling through the slick. It assumed that all fur seals migrating through the Pass would contact a patch of oil and die from hypothermia. It then doubled the number of seals expected to be present. The result was a "one-time loss of 2,160 to 4,320 fur seals (0.2-0.4% of the total population of 871,000) . . . ." (Sale 89 EIS p. IV-202). Even if it were to take more than one generation for the fur seal population to replace this loss (ibid.), both the loss and the number of seals needed for subsistence are less than one percent of the fur seal population. Once again, MMS reasonably concluded that even a catastrophic spill in Unimak Pass would not significantly restrict subsistence uses in the Pribilofs, and that no discussion was needed in the 810 evaluation.

B. Effects on Subsistence Uses of Other Pinnipeds

The State also criticizes the 810 evaluation for failing to "mention subsistence use of [harbor] seals and walrus which occur or pass through the lease area for subsistence by Alaskans in areas *outside* Bristol Bay." (Enclosure V, p.2) (emphasis added). Significantly, the State does not criticize the extensive analysis of the effects of activities on subsistence use of these mammals by rural Alaskans within the Bristol Bay region. (EIS pp. III-C-29 through 34, IV-K-1 through 10).

Given that activities will not significantly restrict subsistence uses within the region, it is hard to see how they could have such an effect outside the region. Eighty percent of the harbor seals in the Bering Sea are found within the area studied and are

found outside the area only infrequently. (EIS pp. III-B-31 and 32, and Graphic 3). We are unaware of, and the State does not mention, any significant subsistence use of harbor seals in the Yukon-Kuskokwin deltas.[36] The remaining 20% of the harbor seal population lives on the islands of the Aleutian chain and will not be affected by activities associated with the leases.

As for the walrus, the situation is the reverse, but the result is similar. Only a part of the population of 250,000 to 300,000 walruses comes within the Bristol Bay region. In the spring between 12 and 26 percent of the population, mostly male, migrates into the region. (EIS at III-B-33 and Graphic 3). Indeed, since much of the 12 to 26 percent of the walrus population estimated to occupy Bristol Bay in spring and early summer occurs well northeast to northwest of the Sale 92 area, even a major oil spill would affect only a small proportion of the population. If the animals remain in the Bristol Bay area through the spring and summer, any adverse effects they experience would not be reflected in the subsistence harvest to the north. In winter the highest concentrations are in northern Bristol Bay and areas further north that will not be affected by activities associated with the lease sale.[37]

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[36] Nunam Kitlutsisti never mentioned harbor seals as a subsistence resource for delta villagers. (EIS p. V-148; Letter of November 5, 1985).

[37] In *Village of Gambell v. Hodel*, the court found that even a "moderate" effect on the walrus population was "unlikely to affect subsistence, given the current abundance of the species." (D. Alaska, A85-184 CIV, memorandum and order of May 23, 1985, page 9).

C. Effects on Subsistence Fishing

The State notes a passage in the EIS indicating that

> "[t]he aggregate effect of salmon mortalities (particularly the more susceptible fry), sublethal effects, and a localized reduction in prey could result in the reduction of a local stock of one or more salmon species. In a local context such effects would be very serious. (Enclosure V, p. 2, quoting EIS p. IV-B-26).

The State asserts that the 810 evaluation "does not adequately asesss these projected localized impacts on subsistence use of [herring and salmon]." According to the State, "[i]f a subpopulation of fish or a specific run returning to a particular area or river system were affected by an oil spill, subsistence uses by the people using that area could be significantly restricted." (Ibid.).

The 810 evaluation did, however, consider the effects of an oil spill on local subsistence uses within the Bristol Bay region. The "aggregate effect" mentioned in the EIS was a kind of worst-case analysis and, for most streams, is too improbable to warrant discussion as a source of significant restrictions on subsistence uses. In the one area where it is reasonable to speculate about this aggregate effect occurring, Nelson Lagoon, the 810 evaluation did address the possibility and found its potential effect on subsistence to be "marginal." (EIS p. IV-K-5). The EIS fully supports these conclusions. To understand the reasoning behind the 810 evaluation on both these points, it will be helpful to consider the two situations separately.

The first situation concerns the effects of an oil spill on a given run of fish while it is migrating through

the sale area on its way to a stream in the Yukon-Kuskokwim delta.[38] Here we are concerned only with adult fish, not juveniles. Because there is virtually no chance that an oil spill, assuming one occurred, would contact the delta within 30 days (EIS Table G-9), there is no real risk to the juveniles as they leave the streams where they were spawned.[39] For the same reason, there is no real risk of a spill preventing the adult salmon in the run from entering the stream. (EIS pp. IV-B-24 and IV-B-25).

The only potential source of harm to the run is that a portion of it may pass through the spill in the open ocean. But the risk this poses to subsistence uses of the run is negligible. To begin with, the fish would have to pass through the spill within the first 12 days of its occurrence, because "[a]romatic compounds in crude oil [, the toxic part of the spill,] in the south-

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[38] This is the situation of concern to Nunam Kitlutsisti. In its letter of November 5, 1985, to Director Bettenberg, that organization said that many of the kinds of fish, waterfowl, and marine mammals captured by delta villagers "frequent the Sale 92 area during periods of their migratory movements."

> For example, large numbers of YK [Yukon-Kuskokwim] Delta chum salmon migrate through False Pass and the nearshore waters during their homeward migration . . . . [A]ny impact to these fish in the Sale 92 area would have a direct and significant effect on the YK Delta villages.

For the reasons explained in the text, we disagree that the effect would be significant.

[39] Upon outmigration, juvenile salmon would remain in coastal waters for several months. Observations from ocean waters off Alaska indicate that coastal movement during the first few months of seaward migration is typical behavior for Pacific salmon throughout their range. (EIS p. III-B-2).

eastern Bering Sea have been estimated to weather in 10 to 12 days." (EIS p. IV-B-4).[40] Next, the effects of the spill on the fish would depend upon the concentration of the oil in the water, the length of their exposure to the oil, and their sensitivity to the oil. The concentration of the oil in the water where a spill occurs is usually substantially below levels that have proven lethal in laboratory experiments. (EIS pp. IV-B-3 through B-5). Additionally, "oil-spill slicks generally occur in patchy configurations and salmon [or other fish] would not be exposed to continuous areas of contamination." (EIS p. IV-B-24). This circumstance differs from conditions in laboratory experiments in which the fish are continually exposed to concentrations of spilled oil for four days (96 hours) or longer. Consequently, at worst, the new fish in the run that are exposed might suffer "sublethal" effects. This would not cause a significant restriction of subsistence uses in the Yukon-Kuskokwim deltas.

The second situation concerns an oil spill contacting a nearshore area. There it might affect adult salmon returning to their spawning streams or salmon fry feeding before migrating offshore. (EIS p. IV-B-24). The EIS considered this possibility:

> Table IV-15 indicates oil spill risk to the various salmon stocks along the northern coast of the Alaska Peninsula and inner Bristol Bay. The

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[40] Our use of this 12-day period errs greatly on the side of the fish. This period was based on assumptions made during an early St. George Basin synthesis meeting in April 1981, assumptions now recognized as overly conservative by the original authors. More recent field measurements show that 3 days is the appropriate figure. (EIS p. V-133, Response 6-30).

> highest risk is associated with salmon congregating at Nelson Lagoon and in the Port Moller/ Bear River areas. The probabilities of an oil spill of 1,000 barrels or greater occurring and contacting these two areas within 30 days are 9 and 3 percent, respectively.[41] Salmon stocks in inner Bristol Bay, which represent about 95 percent of the regional population, have negligible risks (less than 0.5 percent) of an oil spill occurring and contacting these populations when they are most vulnerable. (Ibid.).

The EIS then considered what, from the standpoint of subsistence, would be "the most extreme case:" "that most fish in a particular run (stream population) would be killed or prevented from spawning." (EIS p. IV-B-25).[42] The 810 evaluation considered how a loss of salmon would affect subsistence in Nelson Lagoon:

> Nelson Lagoon could experience some temporary changes in subsistence-use patterns. For example, there could be an increased need for caribou if salmon were too tainted to be used for human consumption. These changes would be marginal (see Sec. IV.B.1.b.(4)). (EIS p. IV-K-5).

This conclusion is supported elsewhere in the 810 evaluation. It is caribou, not salmon, that is the most

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[41] The revised probabilities from the environmental assessment are 8 and 2 percent, respectively. (EA, App. A, Table 6).

[42] This extreme case—that most fish in a particular run would be killed or prevented from spawning—is most improbable considering that concentrations high enough to elicit avoidance responses or mortalities in adult salmon have not been observed in actual spills.

important subsistence resource in terms of total pounds of protein harvested for subsistence in the lower Alaska Peninsula subregion. (EIS p. III-C-32). Furthermore, subsistence users there rely on more than one species of salmon, so effects on one would not significantly restrict their total subsistence harvest. (EIS p. Table III-38).

In sum, the State is incorrect to conclude that "[t]he 810 section fails to evaluate the local effects that an oil spill and potential declines in salmon stocks could have on subsistence use of these stocks." (Enclosure V, p. 3).

In the case of the potential impacts on herring, the EIS states, "Even a major oil spill . . . that spreads to cover 200 square kilometers, however, would affect only a small portion of the regional population widely dispersed in the pelagic environment. In summary, an oil spill that did not contact nearshore areas would have a minor effect on regional populations of adult and juvenile herring . . . ." (EIS p. IV-B-32). The EIS also points out that it is very unlikely that an oil spill will occur and contact localized areas of importance for herring, such as Cape Newenham/Togiak, Port Heiden, Port Moller/Herendeen Bay, and the southern coast of the Alaska Peninsula. (EIS pp. IV-B-35 and IV-B-36).

But even if part of a stock of herring were seriously affected within the Bristol Bay region, it still would not significantly restrict subsistence uses of herring in the Yukon-Kuskokwim deltas. This is because the subsistence needs of those in the Yukon-Kuskokwim deltas would be met by the northern stock and that part of the southern stock which does not come near the sale area. The herring population of the eastern Bering Sea divides into discrete stocks generally at

Nunivak Island. The northern stock would not be affected by activities on Sale 92 leases. The probability of a spill reaching Nunivak Island or the shoreline beyond is less than 0.5 percent. (EIS Tables G-7, G-8, and G-9). The southern stock, which comprises approximately 80 percent of the adult spawning population of the eastern Bering Sea, consists primarily of fish returning to spawn in the Togiak area of Bristol Bay, where the largest Alaska commercial herring fishery is conducted. (Relative to the Togiak area, considerably fewer herring spawn along the north shore of the Alaska Peninsula.) Togiak adult and juvenile herring divide their migration paths to and from Togiak, one going along the Alaska Peninsula, the other going directly out to sea.

D. Effects on Subsistence Use of Coastal and Marine Birds

The State points out that "the 810 evaluation makes no mention of the predicted effects of Sale 92 upon subsistence use (primarily by people of the Yukon-Kuskokwim delta) and management of black brant, cackling Canada or emperor geese." (Enclosure V, p. 3).

The FEIS acknowledges the potential adverse effects on these species. (EIS pp. IV-B-66 to 70). "Brant, cackling Canada, . . . and emperor goose populations are particularly vulnerable because most . . . of their Pacific or world population concentrates in one or two limited areas." Although cackling Canada geese, which use Ugashik Bay, are not at risk from any oil spill in the sale area, there could be a major effect on brant and emperor geese if an oil spill entered Izembek or Nelson Lagoons. (EIS p. IV-B-64). However, within 10 days, there is negligible probability (less than 0.5 percent) of a spill occurring and con-

tacting Izembek Lagoon and only a 5 percent probability of a spill occurring and contacting Nelson Lagoon. (EA App. A, Tables 3 and 6, land segments 8 and 11). This probability represents the likelihood of a spill reaching, but not necessarily entering, the lagoon. The chance of an adverse impact on birds and other resources within the lagoon is lessened further because "[t]he coincidence of necessary winds and tides . . . sufficient to push an appreciable quantity of oil from a spill into a lagoon system such as Izembek is extremely unlikely." (EIS p. IV-A-19). Only one spill of 1000 barrels or greater is projected to occur over the life of any field discovered in the Sale 92 area.

We know that aircraft overflights can disturb geese, especially the brant, which is extremely sensitive to the noise of low-flying aircraft during its premigratory staging in Izembek Lagoon. Still, no evidence as yet shows that this disturbance alters the seasonal distribution or abundance of the geese (EIS p. IV-B-68), and our concern about the effects of the noise on the geese is based on a chain of suppositions.[43] Since the evidence to support these suppositions is speculative at best, there is no substantiated reason to expect a significant restriction of subsistence uses of specific goose populations in the Yukon-

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[43] Based on known behavioral responses of brant to disturbance, and presumed physiological consequences resulting from it, one could speculate that aircraft overflights of the lagoon could displace brant from primary foraging areas for varying periods. In turn this may result in both elevated metabolic cost from additional flying, and decreased energy intake from decreased foraging time in less productive foraging areas, where competition also may be more intense. The decrease in foraging time might result in greater adverse effects than might be expected, since observations by Izembek National Wildlife Refuge personnel suggest that most foraging takes

Kuskokwim deltas from aircraft flying to and from OCS activities in the sale area.

It is important to remember, too, that the Department does not regulate the use of the airport at Cold Bay.[44] In any event, an information-to-lessees clause (ITL) (g) adopted for this sale advises lessees of minimum altitudes recommended by the Fish and Wildlife Service. The Department will continue to monitor disturbance of geese by aircraft flying over the Lagoon and may take further steps if the ITL provides ineffective.

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place in two intensive (tide-related) periods per day. Thus, any disturbance occurring during these period might have much greater consequences than would be implied simply by the elimination of a certain interval from the day's activities. (Aircraft, on the other hand, do not wait for the tides, so we do not expect overflights to be concentrated at the same time the geese are feeding.) Energetic stress associated with alarm reactions probably would be of minor consequence unless it occurred frequently during the two daily periods of intensive foraging, in which case some interference with foraging would be expected. In combination. these adverse effects might cause a decline in physiological condition and/or delayed attainment of readiness for completion of the next phase of the annual cycle. In spring, such adverse effect could delay arrival at the nesting areas, and result in reduced egg production and reproductive success; in fall, the effects could include the inability to undertake or complete migration to traditional overwintering areas under the most favorable weather conditions which occur sporadically, as well as decreased winter survival. Emperor geese are less sensitive to disturbance than brant, but could evidently be expected to experience some of the same types of adverse effects.

[44] Activities at Cold Bay are beyond the scope of this Department's obligations under section 810. See *City of Angoon v. Hodel*, A83-234 CIV (D. Alaska, October 17, 1985).

APPENDIX I

STATUTE INVOLVED

Section 810 of ANILCA, 16 U.S.C. 3120, provides:

(a) In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes. No such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such Federal agency—

(1) gives notice to the appropriate State agency and the appropriate local committees and regional councils established pursuant to section 805;

(2) gives notice of, and holds, a hearing in the vicinity of the area involved; and

(3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

(b) If the Secretary is required to prepare an environmental impact statement pursuant to section 102(2)(C) of the National Environmental Policy Act, he shall provide the notice and hearing and include the findings required by subsection (a) as part of such environmental impact statement.

(c) Nothing herein shall be construed to prohibit or impair the ability of the State or any Native Corporation to make land selections and receive land conveyances pursuant to the Alaska Statehood Act or the Alaska Native Claims Settlement Act.

(d) After compliance with the procedural requirements of this section and other applicable law, the head of the appropriate Federal agency may manage or dispose of public lands under his primary jurisdiction for any of those uses or purposes authorized by this Act or other law.

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